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SUPREME COURT U

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

FURNESS, WITHY & COMPANY, LIMITED,
Respondent-Appellant, Petitioner,

AGAINST

YANG-TSZE INSURANCE ASSOCIATION, LIMITED,
Libelants-Appellees, Respondents.

No. 106

MEMORANDUM IN BEHALF OF YANG-TSZE INSURANCE ASSOCIATION, LIMITED, AND OTHERS, IN OPPOSITION TO THE SECOND PETITION FOR A WRIT OF CERTIORARI HEREIN.

The petitioner, as owner of the steamship *Pomaron*, presented a petition for a writ of *certiorari* herein on April 12, 1915 (Docket Number 921), which was denied by the Court April 19, 1915. The application is now renewed on the ground that on May 10, 1915, the Court granted a writ of *certiorari* in the case of Olaf Lie, as master of the Norwegian steamship *Selja*, petitioner, against the San Francisco & Portland Steamship Company (Docket Number 928).

I.

There is no real analogy between this case and the case of *The Selja*, in which the Court granted a writ of *certiorari* on May 10, 1915.

The grounds on which the Court granted the writ in the *Selja* case are not stated in any opinion.

It appears to involve a construction of Article 16 of the Collision Rules relating to the speed of vessels in fog and to the duties of a vessel on hearing the fog signal of another vessel forward of the beam, the position of which is not ascertained.

The present case arises under Article 21 of the rules, which requires the privileged vessel, in crossing cases, to "keep her course and speed."

It is evident from these circumstances alone that the analogy between the two cases cannot possibly be close.

In this case, both the courts below have found that the petitioner's vessel, which was in the position of a privileged vessel, on a crossing course, in broad daylight, violated Article 18 by failing to keep her course and speed. If she had kept her course and speed, there would have been no collision. It would be impossible for this Court to decide the case without a re-examination of all the facts, because the legal point which the petition seeks to raise would not arise unless the Court should first decide, on the facts, that the failure of the *Pomaron* to keep her course and speed

did not contribute to the collision. It would only be after such a determination that the Court would be called upon to consider whether the broader statement of the rule announced in *The Pennsylvania*, 19 Wall. 125, and later cases could possibly arise.

There is no foundation for the statement in the petition that the *Pomaron* was not violating a statutory rule at the time of the collision. The undisputed facts are that she had twice changed her course, under a port helm, on approaching the other vessel, and had stopped and reversed her engines. It was also undisputed that she was swinging under a port helm and backing when the collision occurred. *Prima facie*, therefore, she was violating the rule in both particulars when she hit and sank the other vessel.

II.

The case is settled and closed.

After the affirmance, by the Court of Appeals, of the judgment of the District Court for the Southern District of New York, holding the owners of the *Pomaron* in contributory fault for the collision, the petitioner, Furness, Withy & Company, on or about October 5, 1914, filed a petition for the limitation of its liability in the District Court, Southern District of New York, alleging that the cargo claims arising from the collision amounted to upwards of $200,000 and that the value of the *Pomaron* and her pending freight amounted to about $70,400. Such proceedings were had under that

petition that on April 22, 1915, a final decree was entered adjudging that the petitioner was in fault for the collision, but holding that the accident occurred without its privity or knowledge, and limiting its liability to the sum of $93,514.90. The decree further directing that this amount be distributed *pro rata* among the various claimants whose claims were allowed in the decree at various sums, aggregating $220,783.15. The decree provided:

"That the petitioner, Furness, Withy & Company, "Ltd., pay or cause to be paid, into the registry of this "Court * * * an aggregate sum of $93,514.90, in "full payment and settlement of all claims against it "arising from said collision; and the petitioner having "paid into the registry of this Court, concurrently with "the entry of this decree, the said sums * * * "it is further Ordered, Adjudged and Decreed that "the petitioner and its surety be and they hereby are "released from all further liability under the said "stipulation for value filed herein * * * or other-"wise by reason of any matter or thing arising from "or growing out of the said collision * * * and "that all bonds, stipulations for value and stipulations "for costs filed herein by the petitioner or by any "party, be and they hereby are cancelled and dis-"charged of record * * *."

The decree contained the usual provisions entering the default of all persons who had not appeared, and adjudging that all claims which have not heretofore been presented or filed are forever barred, and that the petitioner and the steamship *Pomaron* be discharged

from all liability in respect thereof. It concluded with the provision that the claimants and their several agents, attorneys, proctors and counsel be enjoined from any further action or prosecution of proceedings taken by them in their own behalf or in behalf of others against the petitioner or against the steamship *Pomaron*, except under the decree to recover for the losses, damages and injuries aforesaid, and provided that each claimant, on receiving his share of the limitation fund, should "execute a receipt for the sum so received, "expressly discharging from liability in respect of the "collision aforesaid the steamship *Pomaron*, her owners "and charterers and renouncing any and every right "of action or suit other than as herein against them or "any of them or against the said steamship *Pomaron* "in law and in admiralty in any Court of any country "or jurisdiction."

All the claimants have been paid the respective proportions of the fund ascertained to be due to them, and have executed receipts of discharge in the terms provided by the decree. The case is, therefore, finally closed and settled as between all the parties, and such settlements have been made without any reservation of rights on the part of the petitioner.

Respectfully submitted,

J. PARKER KIRLIN,
Counsel for the Yang-Tsze Insurance Association, Limited.

New York, 28 May, 1915.

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